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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Estate of EDWARD J. BORESS, Deceased.	
BERNARD M. BORESS, as Administrator, etc., Petitioner and Respondent, v. HARRY BORESS, Objector and Appellant.	A092576 (Contra Costa County Super. Ct. No. P9801744)

Harry Boress appeals in propria persona from rulings made by the trial court in connection with the administration of the intestate estate of Edward Boress. He contends that the trial court abused its discretion by instructing the administrator not to pursue on behalf of the estate a joint tenancy account worth $497,062.15 and by denying a series of motions challenging the management and competency of the administrator. He also appeals the award of extraordinary legal fees. We find no error and affirm.

FACTUAL AND PROCEDURAL HISTORY

Edward J. Boress died on October 11, 1998. At the time of death, he was a resident of Contra Costa County. Edward died intestate leaving no surviving spouse or children. He was survived by five siblings, Bernard M. Boress, Sidney D. Boress, Beatrice B. Weinberg, Harry Boress, and Ruther Soloff. Bernard Boress was appointed administrator of the estate.

On July 20, 2000, the administrator completed the administration of the estate and filed with the Contra Costa Superior Court an amended first and final account and report of administration and petition for approval thereof, for allowance of statutory and extraordinary attorneys' compensation, and for final distribution (collectively, Final Report). The Final Report contained a summary of the account showing the total amount of the estate to be $460,173.81. The summary also showed a joint tenancy account with Ruth Soloff in the amount of $497,064.19 that did not pass through the probated estate. A second amended Final Report, which was ultimately approved by the court, was filed on August 22, 2000.

Appellant filed an objection to the Final Report, arguing that the administrator should have pursued the joint tenancy property, suggesting that the administrator improperly sold estate assets at less than market value, and challenging the amount of certain expenditures relating to the preparation of the deceased's condominium for sale. Appellant also objected to the extraordinary fees requested for legal services. The administrator filed a declaration by his attorney, Scott Reynolds, that contained a justification of the various fees and confirmed the estimated value of the property sold. In addition, he filed a petition with the court seeking an instruction as to whether pursuing a claim against Ms. Soloff would be a justifiable use of estate assets. Throughout the following months, and prior to the court's ruling on the Final Report and petition for instructions, appellant filed a number of additional motions based on the same purported mismanagement of the estate, including a petition for removal of Bernard Boress as administrator of the estate.

On December 4, 2000, the trial court issued the following rulings: (1) appellant's motion to compel was denied; (2) appellant's motion to set aside motions (petitions for instruction, petition to approve account and final distribution and removal petition) was denied; (3) appellant's motion for return of filing fee was denied; (4) appellant's motion to deny waiver was denied; (5) appellant's motion for equitable distribution was denied (joint tenancy account); (6) the administrator was instructed not to pursue any actions against Ms. Soloff to attempt to recover the joint tenancy properties; and (7) the petition

for final distribution was approved. A second order was entered on December 28, 2000, on additional matters: (1) appellant's motion for entry of default judgment against Ruth Soloff was denied; (2) appellant's motion to stay proceedings pending appeal was granted provided he comply with court's order regarding bond requirements; (3) appellant's motion for waiver of bond was denied; (4) appellant's motion for reimbursement from Ms. Soloff was denied and dismissed without prejudice; and (5) appellant's motion for reimbursement of taxes from Ms. Soloff was denied and dismissed without prejudice.

It is unclear from the notice of appeal and appellant's opening brief exactly which of the above rulings he appeals. Nonetheless, the court will treat the appeal as raising the following contentions with regard to the above two orders: (1) the trial court abused its discretion by instructing the administrator not to pursue the assets in the joint tenancy account on behalf of the estate; (2) the trial court abused its discretion by disregarding his objections to the Final Report based on the purported mismanagement of estate assets; (3) the trial court erred by denying his motion to compel interrogatory responses by nonparties; (4) the trial court erred by denying his motion for entry of default judgment against Ruth Soloff; and (5) the trial court erred by denying his motion for the return of filing fees.

DISCUSSION

I. The Joint Tenancy Account

"In order to set aside a joint tenancy agreement on the ground of undue influence, it is necessary to establish that the influence was such as to destroy the free agency of the party claimed to have been unduly influenced. It is not sufficient to prove general influence, however strong and controlling, but it must be shown that the influence was used directly to procure the joint tenancy. It must amount to coercion destroying the free agency of the party claimed to have been unduly influenced." (*Estate of Kreher* (1951) 107 Cal.App.2d 831, 839.) In pursuing a lawsuit to recover the joint tenancy assets, the estate would have the burden of proving undue influence by clear and convincing evidence. (*Estate of Ventura* (1963) 217 Cal.App.2d 50, 58.)

On June 28, 2000, Bernard Boress petitioned the court under Probate Code section 9611 for an instruction that it would be in the best interests of the heirs of the estate for him, in his capacity as administrator, to waive any and all interest that the estate might have in the assets owned jointly by the deceased and Ruth Soloff. The administrator and his counsel, after conducting an investigation into the transfer of assets into the joint tenancy account, determined that the likelihood of success in pursuing the assets was minimal and any potential success was outweighed by the financial costs to the estate. He suggested that it was entirely understandable why the decedent gave a large part of his estate to Ms. Soloff, as she was the only one of his siblings who maintained any regular contact with him. Moreover, she communicated with her brother by mail from a distance of 3000 miles, so that there was little likelihood of establishing undue influence. On December 4, 2000, the court granted the petition and instructed the representative to take no further action against the joint tenancy assets.

Appellant argues the court abused its discretion in doing so. Appellant rejects the administrator's evaluation of the estate's case against Ms. Soloff and disputes the administrator's characterization of her relationship with the decedent. He argues that a suit against Ms. Soloff for the return of the joint tenancy assets on an undue influence theory would have a strong likelihood of success, noting that it was only after the decedent was living alone and had suffered a stroke that Ms. Soloff began writing him letters containing "tales of woe" and knit him a sweater. He submits that he and the other heirs also maintained regular contact with the deceased. He further argues that because Ms. Soloff gave no consideration in the transfer, the transaction must be viewed as an advance on her share of the estate or, alternatively, that she holds the assets in a constructive trust for the remaining heirs.

Appellant's arguments fail. While the lack of consideration may be relevant in determining undue influence, it does not compel such a conclusion. The other evidence considered by the administrator and by the court below supported the view that there was little chance of proving undue influence, and the court was not bound to accept the appellant's outlook in determining whether to authorize the commencement of litigation

against Ms. Soloff. Moreover, the transfer cannot be considered an advance on Ms. Soloff's share of the estate because there is no evidence of a contemporaneous writing so indicating. (Prob. Code, § 6409.) Similarly, there is no constructive trust because there is no evidence that Ms. Soloff promised to hold the assets for the benefit of the others. (*Estate of Holt* (1923) 61 Cal.App. 464.) Appellant's argument that he has structured his own estate in this manner does not establish that the deceased necessarily did the same. In light of the evidence before the court, the decision to waive any potential interest in the joint tenancy assets was prudent and reasonable. The trial court did not abuse its discretion in so instructing the administrator.

II. Mismanagement of the Estate

We review an order approving and settling a decedent's estate, including orders approving extraordinary legal fees, orders approving expenditures of estate assets by the administrator and orders confirming the sale of property, under the abuse of discretion standard. (See *Estate of Massaglia* (1974) 38 Cal.App.3d 767 [administrator's expenditures]; *Estate of Taylor* (1967) 66 Cal.2d 855 [extraordinary legal fees]; *Estate of Denlinger* (1950) 98 Cal.App.2d 130 [confirming sale of property].) " '. . . These matters must of necessity be left to the discretion of the judge in settling the account; and unless it appears that such discretion has been abused, it is not subject to review. . . .' " (*Estate of Massaglia, supra,* 38 Cal.App.3d at p. 774.)

Appellant contends that the trial court abused its discretion in approving the Final Report and distribution plan where he made objections that demonstrated that the personal representative was mismanaging the estate.[1]

A. The Sale of Estate Assets

The decedent's 1996 Oldsmobile was sold for $6,500. This value was derived by the administrator from conversations with a car dealership in the Southern California

[1] These arguments similarly form the basis of appellant's petition to remove Bernard Boress as administrator of the estate. Because we conclude that the trial court did not abuse its discretion in approving and settling the decedent's estate, we likewise conclude that the court did not abuse its discretion in concluding that there was no basis for the removal of the administrator.

area. The Kelly Blue Book wholesale value for a similar car at that time was $7,525. The decedent's one-bedroom condominium located in Concord, California was sold for $55,103.17. The administrator submitted the appraisal of two real estate agents valuing the property at approximately $45,000 to $50,000. In his objection, appellant argued that these appraisals were too low and that the administrator acted unreasonably in selling these assets at these prices. In support of his motion, he submitted computer printouts showing the Kelly Blue Book retail value of similar cars at $8,000 to $9,000 and the value of what he considered comparable condominium properties at $95,000 and $99,000. The trial court rejected appellant's objections and approved the Final Report.

The trial court reviewed the evidence submitted by the parties and determined the sale was to the advantage and bests interests of the estate. (*Estate of Denlinger, supra,* 98 Cal.App.2d at p. 133.) The representative obtained estimates of the value of the assets from proper sources and his reliance on those estimates was entirely reasonable. The conclusion is supported by ample evidence. Accordingly, the court did not abuse its discretion by confirming the sale of these assets.

B. Payment of Estate Taxes

Under Probate Code section 20111, estate taxes should be prorated "in the proportion that the value of the property received by each person interested in the estate bears to the total value of all property received by all persons interested in the estate . . . ." The administrator prorated the estate taxes in compliance with this section. Under this formula, Ruth Soloff's percentage was higher, in order to account for the taxes paid on the joint tenancy assets. This additional amount was charged against her share of the equally divided estate.

Appellant contends the representative mismanaged the estate by using estate assets to pay taxes due on the joint tenancy account because the joint tenancy assets were never in the administrator's possession. Contrary to appellant's contention, the probate code specifically provides for the proration and collection of taxes from interested persons where taxes are paid on property not in the possession of the administrator. (Prob. Code, § 20116.) Moreover, because appellant's share of the estate was not diminished by this

transaction, appellant suffered no harm from the representative's decision in this respect. Accordingly, the trial court did not abuse its discretion in approving the provisions in the Final Report providing for the payment of estate taxes.

C. Extraordinary Legal Fees

An award of extraordinary fees "provides for compensation for services which are not involved in the typical probate case, and that approach authorizes the court to allow additional compensation for those unusual services—so-called 'extraordinary' services." (*Estate of Hilton* (1996) 44 Cal.App.4th 890, 895.) Such services may "include services in connection with such matters as litigation with third parties, federal estate tax matters, sales of property, etc." (*Id.* at p. 895, fn. 5.) The trial court made an award of extraordinary fees in the amount of $32,760.25.

Appellant contends that this amount is excessive. He argues that the payment of extraordinary legal fees was unwarranted where much of the work could have been done by paralegals and that paying these fees out of estate assets improperly penalized him for challenging the distribution plan. In response to appellant's objection, the administrator's counsel submitted a declaration setting forth his fees and attached his billing records as an exhibit. Fees were requested for services in four categories: (1) tax-related services; (2) real estate related services; (3) miscellaneous additional services to the estate; and (4) responding to and taking action against objections filed by estate beneficiary. The miscellaneous work included locating the decedent's social security number, collecting bank accounts and HH bonds from various banks and gaining access to safe deposit boxes. Upon review of counsel's declaration, it is clear that the services provided fall within the category of extraordinary services and the billing records provide substantial support for the amount of the court's award. Accordingly, the trial court did not abuse its discretion in making such an award.

D. Improper Expenditures of Estate Funds

The administrator claimed expenditures against the estate for the cost of cleaning out the apartment, installing new carpet and fresh paint and replacing the entire bathroom and the kitchen counters. Appellant's objection challenged approximately $15,000

dollars spent on readying the condominium for sale. He did not, however, present evidence to support his objection other than the conclusion that he could have done the work for less. The administrator submitted that these repairs were necessary because the condominium sat empty for two years and smelled of rotten food, and that the living areas were so crowded with files, boxes, mail and other items, it took two people a few days to clean it out. He argued that the expenses were reasonable in light of the extensive repair work done. On this evidence, it does not appear that the trial court abused its discretion in finding these expenditures were both reasonable and necessary.

III. Non-Party Interrogatories

On August 7, 2000, the trial court gave appellant 30 days in which to conduct the necessary discovery to support his various motions and objections that were set to be heard on September 7, 2000. The record contains documents entitled "Interrogatories and Subpoena Duces Tecum" directed at each of the deceased's heirs as well as Cal First Federal and Bank of America. It is unclear from the record exactly how appellant attempted to serve these requests. Appellant contends that no one responded to his requests and therefore he filed a motion to compel, also set to be heard on September 7, 2000. The motion was denied on the ground that the interrogatories did not comply with either the Code of Civil Procedure or the Probate Code in that they either were not timely sent to counsel for the administrator or were sent to parties not appearing.

The standard interrogatory procedures set forth in the Code of Civil Procedure are not applicable to appellant's requests. Code of Civil Procedure section 2030 provides for the service of interrogatories on "any other party to the action." It is well settled that " '. . . nonappearing heirs and legatees and creditors are not parties to a probate proceeding. . . .' " (*Estate of Kent* (1936) 6 Cal.2d 154, 162.) Thus, neither the nonappearing heirs nor California First Federal or Bank of America could properly be compelled to answer interrogatories under this section.

The more applicable process is found in Probate Code section 8870, under which an interested person may petition the court for a citation to a person to answer interrogatories where that person has knowledge of a "conveyance . . . or other writing

that contains evidence of or tends to disclose the right, title, interest, or claim of the decedent to property." (Prob. Code, § 8870, subd. (a)(2)(A).) The petitioner must give the personal representative 15 days notice of any hearing under subdivision (a). (Prob. Code, §§ 8870, subd. (d), 1220.) No such notice appears in the record. Accordingly, the trial court did not err by denying appellant's requested discovery.

IV. Default Judgment

Probate Code section 20121 provides for a petition to be filed with the court requesting that the court prorate estate taxes among interested persons. A summons and copy of the petition must be served on any person who may be directed to make payments of a prorated amount. (Prob. Code, § 20122, subd. (b).) The court's order is treated as a judgment and may be enforced for the collection of the prorated amounts. (Prob. Code, § 20125.) Appellant filed a petition against Ruth Soloff under Probate Code section 20121 to recapture the $54,352 in estate taxes paid by the administrator out of estate funds in connection with the joint tenancy account. Apparently, Ms. Soloff did not file a response to appellant's petition, causing appellant to move for the entry of her default. The trial court denied appellant's motion.

As discussed in more detail above, the administrator properly prorated the estate taxes among the heirs and surcharged Ms. Soloff's share of the estate for the taxes owing on the joint tenancy account. Thus, under the terms of the Final Report, Ms. Soloff fully satisfied her obligations to the estate regarding any amounts owing for estate taxes on the joint tenancy account. Accordingly, the trial court did not err in denying appellant's motion for entry of default.

V. Filing Fees

Appellant challenges the denial of his motion for the return of filing fees paid in connection with his objection to the administration of the decedent's estate. Appellant relies on Probate Code sections 202, subdivision (c) and 6605, neither of which is applicable. Section 202 allows for the filing at no cost of a petition to establish death where proceedings for the administration of the decedent's estate are already pending. Section 6605 permits a petition for a small estate set-aside to be filed at no cost where

proceedings for the administration of the decedent's estate are already pending. The objection filed by appellant does not fall within either of the limited circumstances noted above in which the petitioner is excused from paying filing fees. Accordingly, the trial court did not err in denying appellant's motion.

DISPOSITION

The orders entered by the trial court on December 4, 2000, and December 28, 2000, are affirmed in their entirety.

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Pollak, J.

We concur:

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Corrigan, Acting P. J.

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Parrilli, J.